UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 04-14345	)	
	)	
DOUGLAS D. HARTLEY	)	
MICHELLE M. HARTLEY	)	
Debtors	)	
	)	
	)	
JOEL BRAUNSTEIN	)	
TERRY BRAUNSTEIN	)	
Plaintiffs	)	
	)	
vs.	)	PROC. NO. 04-1343
	)	
DOUGLAS D. HARTLEY	)	
MICHELLE M. HARTLEY	)	
Defendants	)	

DECISION

At Fort Wayne, Indiana on September 28, 2005.

This adversary proceeding arises out of a contract between the plaintiff, Joel Braunstein, and Homecrafters of Northern Indiana, Inc., a corporation owned by the defendant/debtor, Douglas Hartley, by which Homecrafters agreed to extensively remodel a lake cottage owned by both plaintiffs. The issue before the court is not whether the builder breached that contract – it undoubtedly did – or whether the plaintiffs have been damaged as a result of the breach – they clearly have been. Rather, the issue is whether the defendants fraudulently induced the plaintiffs to enter into the contract, so that the obligation arising out of the breach constitutes a non-dischargeable debt under § 523(a)(2)(A) of the United States Bankruptcy Code. This portion of the Bankruptcy Code excepts from the scope of a debtor's discharge debts "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by – false pretenses, a false

representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). The matter is before the court following trial of that issue.

While a debtor's failure to perform a contract is not sufficient to except the debt arising out of that breach from the scope of a bankruptcy discharge, In re Barr, 194 B.R. 1009, 1017-18 (Bankr. N.D. Ill. 1996); In re Guy, 101 B.R. 961, 979 (Bankr. N.D. Ind. 1988), section 523(a)(2)(A) will operate to make such a debt non-dischargeable if the injured party was fraudulently induced to enter into the underlying contract. In re Sikorski, 239 B.R. 661 (Bankr. D. Conn. 1999); In re Guy, 101 B.R. at 979. Plaintiff bears the burden of proving this fraud by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 287-88, 111 S. Ct. 654 (1991). It must prove that the debtor misrepresented material facts to the plaintiff and did so with the intent to deceive. Furthermore, the plaintiff must also prove that it relied upon those misrepresentations in entering into the agreement and that it has been damaged as a result. See, In re Zinck, 321 B.R. 916, 920 (Bankr.W.D.Wis. 2005); In re Copeland, 291 B.R. 740, 760 (Bankr. E.D. Tenn. 2003); In re Vernon, 192 B.R. 165, 171 (Bankr.N.D. Ill.1996); In re Keller, 72 B.R. 599 (Bankr. M.D. Fla. 1987); In re Hicks, 79 B.R. 45, 48 (Bankr. N.D. Ala. 1987); In re Gans, 75 B.R. 474, 482-83 (Bankr. S.D.N.Y. 1987); In re Edwards, 67 B.R. 1008, 1009-10 (Bankr. D. Conn. 1986), In re Hunt, 30 B.R. 425, 435 (Bankr. M.D. Tenn. 1983).

In an effort to prove their claim of fraudulent inducement the plaintiffs contend that defendants made five (5) specific representations:

1. When the parties first met and during the meetings leading up to the execution of the contract, plaintiffs contend the defendants represented that Mr. Hartley was an experienced contractor with 8 to 10 years of experience as general contractor and an additional 8 to 10 years of experience in the construction industry prior to becoming a general contractor. In reality, Homecrafters had been a licensed general contractor for less than two years. Prior to that time, Mr. Hartley had done framing and carpentry work for another general contractor – Harmon

Remodeling.

2. When the parties first met and during the meetings leading up to the execution of the contract, plaintiffs were shown photographs of projects that, they contend, were represented to be the defendants' work as a general contractor. In reality only two of those projects had been undertaken by Mr. Hartley's company, the remaining photographs represented projects on which Mr. Hartley had worked while in the employ of Harmon Remodeling.

3. After reviewing the architect's plans and discussing the nature of the project with the plaintiffs, Mr. Hartley represented that he had the ability to construct the project.

4. Mr. Hartley represented that he was bonded and insured. Homecrafters was not bonded and Mr. Hartley failed to provide the plaintiffs with a copy of the company's insurance policy when they requested it.

5. When the parties first met at the Home Show in Fort Wayne, the defendants had a display advertising six free windows if a contract was signed as a result of the show. Plaintiffs never received these windows.

Not every representation can form the stuff from which fraud is made. Some representations are simply too general or too non-specific to be the basis of a fraud claim, even when they turn out to be inaccurate. Representations of quality often fall into this category and are characterized as a seller simply puffing. In re Copeland, 291 B.R. 740, 762 (Bankr. E.D. Tenn. 2003); In re Barr, 194 B.R. 1009, 1018 (Bankr. N.D. Ill. 1996); In re Keller, 72 B.R. 599, 602 (Bankr. M.D. Fla. 1987). See also, Vaughn v. General Foods Corp., 797 F.2d 1403, 1411 (7th Cir. 1986). Furthermore, some care should be taken to maintain the line which separates tort from contract. Clark-Fitzpatrick, Inc. v. Long Island R. Co., 516 N.E.2d 190, 194 (N.Y. App. 1987)(charging a breach of a duty of care does not transform a simple breach of contract into a tort). As a result, statements such as those concerning an anticipated level of performance, which one would normally expect either to have been included in the contract or to have been the subject of bargaining, may not be sufficient to support a claim of fraud. This helps prevent one from using the claim of fraud to create performance

related obligations that are not found anywhere within the parties' actual contract. See, Cerabio LLC v. Wright Medical Technology, Inc., 410 F.3d 981 (7th Cir. 2005); All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862 (7th Cir. 1999). To state the issue somewhat differently, if representations of this type really were that important, one would expect them to have been specifically included in the contract and the failure to do so leads to the conclusion that they were not material. Saunders Leasing System, Inc. v. Gulf Cent. Distribution Ctr., Inc., 513 So.2d 1303, 1306-07 (Fla. Ct. App. 1987). Finally, there are representations which are not only sufficiently specific, but also sufficiently significant that they can, if proven to be false, form the basis for a claim of fraud. The representations about which plaintiffs complain fall into each of these categories.

Homecrafters failed to provide the free windows which were advertised at the Home Show. While there are discrepancies in the testimony with regard to the precise number of windows which were to be provided or the circumstances under which they were to be given, it is not necessary to resolve that dispute. Unless the plaintiffs are able to prove that the defendants had no intention of providing those windows at the time the representation was made or when the contract was entered into, the failure to deliver them constitutes nothing more than a breach of contract and not a claim for fraud. In re Guy, 101 B.R. at 978; In re Faulk, 69 B.R. 743, 750 (Bankr. N.D. Ind. 1986). See also, F.D.I.C. v. Perry Brothers, Inc., 854 F. Supp. 1248, 1267 (E.D. Tex. 1994). There is no such evidence.

Mr. Hartley's alleged misrepresentation about being bonded, when Homecrafters in fact was not, is not the type of representation which can properly support a claim of fraudulent inducement. Whether or not the performance of the plaintiffs' remodeling project was to be bonded is the type of performance related commitment or obligation one would expect to be the subject of bargaining and, if it was to be required, included in the parties' contract. Nothing in that contract requires the

builder to have a bond. Consequently, the court finds that any representation concerning a bond was not material and will not support a claim of fraud. See, Saunders Leasing System, 513 So.2d at 1306-07. To the extent plaintiffs complain about representations concerning insurance, they have not proven that such representations were false, only that defendants failed to provide them with a copy of the policy; the court is not willing to infer falsity from that failure.

Mr. Hartley's representation that he had the ability to remodel plaintiffs' cottage in accordance with their architect's plans is not the stuff of which fraud is made. Such generalized representations concerning quality, ability, and similar expressions of opinion are not sufficiently specific to support a claim for misrepresentation when expectations end up being disappointed. See e.g., Deming v. Darling, 20 N.E. 107 (Mass. 1889)("The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed."). These types of representations constitute mere puffery which cannot be the basis for fraud. See, Searls v. Glasser, 64 F.3d 1061, 1066 (7th Cir. 1995); Continental Bank, N.A. v. Meyer, 10 F.3d 1293, 1299 (7th Cir. 1993); Royal Business Machines v. Lorraine Corp., 633 F.2d 34 (7th Cir. 1980); In re Barr, 194 B.R. 1009, 1019 (Bankr. N.D. Ill. 1996).

The final two representations of which plaintiff complains – Mr. Hartley's misrepresentation of his experience as a general contractor and the representation that the work of another contractor was his own – are the stuff of which fraud can be made. The court readily accepts the plaintiffs' thesis that, if the defendants specifically misrepresented Mr. Hartley's experience and qualifications as a general contractor, or falsely presented someone else's work as his own, those representations are sufficient to support a claim of non-dischargeability under § 523(a)(2)(A), if the other

requirements of the statute are also met. In re Stone, 75 B.R. 377, 379 (Bankr. Vt. 1984). Of course, it is the plaintiffs' burden to prove that defendants actually made the misrepresentations of which they complain, Grogan v. Garner, 498 U.S. at 291, and in this case that issue is hotly contested.

In the face of plaintiffs' contentions that misrepresentations were made, the defendants presented evidence that they accurately disclosed Mr. Hartley's experience as a general contractor and Mr. Hartley's prior work with other contractors at both their initial and subsequent meetings. Where the photographs are concerned, defendants testified that they explained to the plaintiffs the different projects and Mr. Hartley's role in them – in other words which projects he served as contractor for and which were the other projects he had worked on with Harmon Remodeling. This is a classic "He said – She said" dispute which presents a question of fact the court is called upon to resolve based upon the evidence presented to it, with due regard for its evaluation of the credibility of the witnesses who testified. Having considered that evidence, the court finds that the defendants' version of the events is the more credible one. As a result, the plaintiffs have failed to prove that the defendants misrepresented either Mr. Hartley's experience or his work.

Plaintiffs have failed to satisfactorily prove that the defendants made misrepresentations which could form the basis for a claim of non-dischargeability under § 523(a)(2)(A). As a result, it is not necessary to discuss the other requirements of that statute. Defendants' obligation to the Plaintiffs is a dischargeable debt and judgment will be entered accordingly.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court